IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.PADMANABHAN NAIR

TUESDAY, THE 19TH JUNE 2007 / 29TH JYAISHTA 1929

A.S.No. 656 of 1996

OS.53/1993 of SUB COURT, QUILANDY

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APPELLANTS/PLAINTIFFS:

1. K. SOUMINI,
   'SREYAS', KALPATHUR AMSOM DESOM,
   QUILANDY TALUK.

2. SHIJITH CHANDH (MINOR)
   'SREYAS', KALPATHUR AMSOM DESOM,
   QUILANDY TALUK.

3. SHYAM CHANDH (MINOR)
   'SREYAS', KALPATHUR AMSOM DESOM,
   QUILANDY TALUK.

   (1st APPELLANT IS THE GUARDIAN AND NEXT FRIEND OF APPELLANTS NOS. 2 AND 3.)

   BY ADV. SRI.N.L.KRISHNAMOORTHY
   ADV. SRI.K.LAKSHAMINARAYANAN
   ADV. SMT.SATHYASREE PRIYA
   ADV. SMT.K.A.MAYA

RESPONDENTS/DEFENDANTS:

1. KOTTARATHIL PADINHATTIDATH
   KARTHIANI AMMA,
   EDAPPALLY VEETTIL THAMASAM,
   KARAYAD AMSOM, THIRUVANGAYUR DESOM OF
   QUILANDY TALUK.

2. K.P. RAMADAS,
S.I.B. , 9TH FLOOR, KEB BLOCK,
KAVERY BHAVAN,
BANGALORE – 9.

3. ELADATH THAMASIKKUM K.P. PRASANNAN,
KALPATHUR AMSOM DESOM,
QUILANDY TALUK.

4. EDAPALLY THAMASIKKUM ULLAS,
KARAYAD AMSOM, THIRUVANGAYUR DESOM OF
QUILANDY TALUK.

BY ADV. SRI.C.VATHSALAN

THIS APPEAL SUITS HAVING BEEN FINALLY HEARD ON 19/06/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. PADMANABHAN NAIR ,J

A.S.No.656 of 1996

Dated, this the 19th day of June, 2007

JUDGMENT

Plaintiffs in O.S.No.53/1993, a suit for partition, on the file of Sub Judge, Quilandy are the appellants. Appellants are the widow and children of deceased Jayachandran. In the plaint it was averred that deceased Jayachandran was one of the children of first defendant and late Padmanabhan Nair. Plaint A schedule properties were acquired by late Padmanabhan Nair in his name. It was averred that B schedule properties were acquired in the name of first defendant by late Padmanabhan Nair using his money and that was a benami transaction. It was averred that first defendant had no money to purchase these properties and hence plaint schedule properties were acquired by late Padmanabhan Nair. Defendants 2 to 4 are also children of first defendant and late Padmanabhan Nair. Padmanabhan Nair died on 24.6.1992. It was averred that late Padmanabhan Nair was suffering various illness and was not in a position to know the nature and consequences of his acts. According to the plaintiffs the widow and four children are entitled to one fifth share each. The plaintiffs claimed one fifth share in the suit properties.

2. Respondents contested the suit and filed a joint written statement. The averment that Padmanabhan Nair died on 24.6.1992 was admitted. It was contended that B schedule properties were not properties acquired by late Padmanabhan Nair using his funds in the name of first defendant but she got that

properties from her tharawad and those properties absolutely belonged to her. It was also contended that deceased Padmanabhan Nair along with first defendant executed a joint will on 26.3.1989 in respect of suit properties. It was further contended that Padmanabhan Nair was having disposing state of mind and he was not suffering from any illness. It was also contended that will was prepared as per the instructions given by the deceased and as such properties scheduled are not liable for partition.

3. On the side of appellants/plaintiffs PW1 was examined. Exts.A1 to A14 proved and marked. On the side respondents/defendants DWs 1 and 2 were examined. Exts.B1 to B20 proved and marked. DW 2 is an attestor to Ext.B1 will. Trial court after considering the evidence found that Ext.B1 will executed by late Padmanabhan Nair was genuine and valid and as such no properties mentioned in the plaint are available for partition and dismissed the suit. Challenging that decree and judgment this appeal is filed.

4. Learned counsel appearing for the appellants has argued that Ext.B1 will executed by late Padmanabhan Nair along with first defendant on 23.6.1989 is not genuine and valid and the same is shrouded with suspicion. It was argued that two minor children of one of the sons (deceased Jayachandran) were not given any property either by late Padmanabhan Nair or first defendant and that alone is sufficient to hold that Ext.B1 will was executed on account of the undue influence exerted by defendants 2 to 4.

5. There are two sets of properties. According to the appellants/plaintiffs A schedule properties absolutely belonged to late Padmanabhan Nair. It was alleged that B schedule properties were acquired by late Padmanabhan Nair using his money in the name of first respondent/defendant, his wife and those acquisitions were benami transactions. First respondent contended that those properties were not acquired by late Padmanabhan Nair in her name using his money, but she got those properties under Exts.B6 to B18. Though it was alleged that properties were acquired in the name of first respondent using the funds of late Padmanabhan Nair, there was absolutely no evidence in support of that contention. Court below after considering the evidence on record found that B schedule properties absolutely belonged to first respondent. Evidence on record further shows that first defendant got most of the properties either by way of gift or assignment by her uncle and a will executed by her father. So materials on record clearly show that B schedule properties absolutely belonged to first respondent which are not available for partition.

6. Court below non-suited the plaintiffs on the ground that Ext.B1 will executed by late Padmanabhan Nair is a genuine document and valid. Ext.B1 will is dated 23.6.1989. Padmanabhan Nair died only on 24.6.1992, three years after execution of Ext.B1 will. It is true that under Ext.B1 will no properties were bequeathed in favour of plaintiffs who are the heirs of a predeceased son. Execution of Ext.B1 will was proved by examining DW2. He had deposed that he

also went along with late Padmanabhan Nair and first defendant to the office of scribe for execution of the will and late Padmanabhan had signed the document in his presence. DW2 was cross-examined at length. But nothing was brought out to discredit his testimony.

7. Learned counsel appearing for the appellants has argued that the specific case put forward by the defendants was that Ext.B1 will was executed as per the instructions given by late Padmanabhan Nair, but the scribe was not examined. It is to be noted that DW1 is the first defendant who is the mother of Jayachandran. She gave evidence to the effect that instructions were issued for preparation of Ext.B1 will by herself and her husband late Padmanabhan Nair. She further deposed before the court below that the document was produced by her husband for registration and she had also accompanied him. She also deposed that the Sub Registrar asked her whether they were aware of the contents of the document and she herself and late Padmanabhan Nair told Sub Registrar that they were aware of the contents of the document. DW1 had further deposed that immediately after the death of Jayachandran the relatives of first plaintiff insisted that DW1 shall bequeath the rights over properties devolved upon her on account of death of Jayachandran in favour of the children of the deceased. So I do not find any merit in the argument that on account of the non-examination of scribe it must be held that Ext.B1 was not a genuine document. Evidence on record shows that the relation between late Padmanabhan Nair and first defendant with

Jayachandran was very cordial. In fact Ext.B1 will was executed in the year 1989 by late Padmanabhan Nair. DW1 gave evidence to the effect that Jayachandran was given other properties and in addition to properties, timber, money and ornaments were given to Jayachandran for construction of house. Ext.B5 shows that DW1 executed a gift deed in respect of the property which devolved upon her on account of death of Jayachandran. Ext.A3 produced by the plaintiffs themselves shows that after the death of Jayachandran the relatives of first plaintiff had suspicion about the conduct of Padmanabhan Nair and troubled him. It is true that in Ext.B4 it is stated that that is only a portion of property due to Jayachandran. But that alone is not a ground to hold that Ext.B1 will is unnatural. Merely because Padmanabhan Nair disinherited the plaintiffs is not a ground to hold that Ext.B1 will is not genuine and validly executed. Evidence on record clearly establishes that there is nothing suspicious in the execution of Ext.B1 will. The finding of the court below is perfectly correct and only to be confirmed. There is no merit in the appeal and it is only to be dismissed.

In the result, appeal is dismissed.

C.M.P.No.3989/1996 will stand dismissed.

K. PADMANABHAN NAIR
JUDGE

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K.PADMANABHAN NAIR, J.

A.S.No.656 of 1996

JUDGMENT

19th June, 2007.